

Buckner, Edwin

From: Hoefer, David
Sent: Wednesday, April 20, 2016 07:10
To: Martin, Mike
Cc: Buckner, Edwin; Bosch, Raymond; Field, Jeff
Subject: RE: Nebraska Railcar - Telephone Conversation Record

Categories: Record Saved - Shared

Yesterday afternoon at 4:51 David Houghton (402-930-1067/402-344-4000), an attorney for NRCS, returned my call to discuss facility access so that Mike Martin could complete the RCRA inspection that he attempted yesterday. Mr. Houghton told me that NRCS was short-handed at the time of Mike's visit, and that some company officers were unavailable due to grand jury proceedings pertaining to an EPA criminal investigation. He expressed concern that Mike's visit may be in furtherance of the criminal investigation. I explained to him that our attempted inspection was a civil inquiry and was not to obtain evidence for a criminal proceeding. I told him that those investigatory functions are separate at EPA and were not coordinated. We then discussed EPA's access authorities under section 3007. He acknowledged our legal authority but repeatedly stated that the timing was very bad given that company representatives are tied up with the criminal proceeding. He also said that he would need to discuss this with NRCS's criminal counsel who is occupied with the criminal proceedings and had an unrelated hearing today. He asked me the possible results of denying access and I explained that: we could go away and he may not hear further from us on this, but I explained that that is unlikely given the circumstances; I told him that we could pursue a civil search warrant; or that we could pursue a proceeding to assess a civil penalty for denial of access. He asked what was likely to happen, and I told him that I didn't know, that that is the client program's decision. I also explained to him our statutory penalty (\$37,500 per day) authority under 3008(a). He asked if we could complete the inspection next week after things calm down and facility personnel are available, I told him that was not my decision, but that we usually treat such requests as a denial, and that I don't know about our inspector's availability next week. He repeatedly stated that he was not denying us access, but that he wanted to defer access. I told him that we would treat this as a denial. I expressed concern that evidence could be lost, violations corrected, etc., and such deferral frustrates EPA's regulatory responsibilities. He repeated that he thought that it was unlikely that he could obtain access until early next week. I asked him if there is anything from EPA that he needs to inform his consideration of the situation - citations to legal authority, further discussions, etc. - and he said that he didn't know but would contact me if he or NRCS's criminal defense attorney had any questions.

-----Original Message-----

From: Hoefer, David
Sent: Tuesday, April 19, 2016 8:07 PM
To: Martin, Mike <Martin.Mike@epa.gov>
Cc: Buckner, Edwin <Buckner.Edwin@epa.gov>; Bosch, Raymond <Bosch.Raymond@epa.gov>; Field, Jeff <Field.Jeff@epa.gov>
Subject: Nebraska Railcar

Mike - David Houghton, the attorney for NRCS, and I spoke this evening about access to the NRCS facility. Let me know when you have some time tomorrow to talk. Thanks.